

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA 14-CR-89(RJA)
vs.
KARONE JOHNSON, Buffalo, New York
Defendant. May 14, 2015
11:06 a.m.
- - - - - X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

WILLIAM J. HOCHUL, ESQ.
United States Attorney
BY: EDWARD H. WHITE, ESQ.
Assistant United States Attorney
138 Delaware Avenue
Buffalo, New York 14202

LOSI & GANGI
BY: PATRICK J. BROWN, ESQ.
147 Linwood Avenue
Buffalo, New York 14209
Appearing on behalf of the Defendant

AUDIO RECORDER: Debbie Zamito

TRANSCRIBER: Christi A. Macri, FAPR-CRR
Kenneth B. Keating Federal Building
100 State Street, Room 2120
Rochester, New York 14614

(Proceedings recorded by electronic sound recording,
transcript produced by computer).

P R O C E E D I N G S

* * *

(WHEREUPON, the defendant is present).

THE CLERK: On the record. This is United States
vs. Karone Johnson, case number 14-CR-89(A).

For the Government, Edward White.

For the defendant, Patrick Brown.

The defendant is present.

We're here for oral argument before the Honorable
Jeremiah J. McCarthy.

MAGISTRATE JUDGE MCCARTHY: Good morning,
Mr. Johnson. Good morning, counsel.

MR. WHITE: Good morning, Judge.

MR. BROWN: Good morning, Your Honor.

MAGISTRATE JUDGE MCCARTHY: Okay. Mr. Brown, it's
my understanding from recent e-mail exchange that the
principle issue that you wish to argue is the legality of the
intercepted telephone calls and text messages, correct?

MR. BROWN: Yeah, that's correct, Your Honor. I
think that's kind of the pivotal issue here.

MAGISTRATE JUDGE MCCARTHY: Okay. Now, why -- why
is -- you indicate in your motion that you reviewed my
decision as to Stacy Samuels. Why is this situation any
different?

MR. BROWN: Judge, I'm not sure that in that

1 decision that there was a -- and I, of course, am saying this
2 respectfully -- an appreciation of the factual difference
3 between this case and the facts of the *Getto* case and the *Lee*
4 case.

5 There's -- we agree, Your Honor, that in the
6 normal -- normal circumstances the courts of the United States
7 aren't going to engage in a review of a foreign wiretap order
8 to see whether or not it complied with the legalities of
9 whatever jurisdiction issued it.

10 And we also understand, Your Honor, that the -- one
11 of the rationales for suppression, namely, the regulation of
12 police activity, the courts have held that that doesn't really
13 apply if -- if the U.S. court's going to make a ruling that
14 perhaps a foreign police department didn't do something the
15 right way.

16 We get that and we're not here to argue some
17 exception to that, but we think that there's a difference
18 here, Judge, because when you look at those cases typically
19 what you see is there's a foreign interception in a foreign
20 country of the -- of the communication.

21 But here it's a little different because we have a
22 claimed interception of Mr. Johnson's telephone
23 communications, the text messages and voice messages, while
24 he's in the parking garage at the Niagara Casino up in Niagara
25 Falls.

1 So we have -- we have somebody who arguably is
2 using a telephone in the United States, would have a
3 reasonable expectation of privacy in those calls made in the
4 United States, the calls are being used against him in a court
5 of the United States and there's this happenstance that they
6 were -- that they were okayed, we believe, by -- by a Canadian
7 court.

8 And you take it to its logical extension, Judge, it
9 would seem that what almost happened here is there could be a
10 carve out from Title III, namely, if you're in a border area
11 where your telephone communications could be intercepted in
12 Canada or I suppose in Mexico, then you don't have any
13 expectation of privacy.

14 And -- and we see that, Judge, as a fundamental
15 difference here because here we know that there was a joint
16 investigation. From the Government's papers we understand
17 that it originated in Canada; it was originally a Canadian
18 operation.

19 But then the U.S. agents cooperated over here with
20 both surveillance and then ultimately with the arrest and the
21 questioning of Mr. Johnson.

22 So this isn't -- this isn't like *Lee* and *Getto*
23 where you -- where you got activity -- one of them was in
24 Israel I believe was *Getto*, and I believe *Lee* is in -- is
25 in -- I think in Jamaica, if I recall correctly, where you've

1 got -- you've got the activity happening down there and then
2 it's going to be used up here. We get that distinction.

3 But this is different here because this is
4 happening on U.S. soil. And we think that that's a
5 distinction that maybe wasn't argued or brought to the Court's
6 attention in the Samuels case that we think makes a
7 fundamental difference because, again, you're treating
8 similar -- people are going to be treated differently but for
9 where this -- where this wiretap order -- I mean, if we're
10 going to allow people in the United States to have their calls
11 intercepted --

12 **MAGISTRATE JUDGE MCCARTHY:** But let's for a minute
13 assume for the sake of argument that it's a joint venture, and
14 I'll just tell you I have difficulty seeing that right now,
15 but let's assume for the sake of argument that it is.

16 You still have to show then, don't you, that there
17 was something improper in the intercept? And in order to do
18 that, you have to show that there was some impropriety in the
19 application for the Canadian court order, right?

20 **MR. BROWN:** Well, Judge, I think -- the short
21 answer is yes.

22 But I think, Judge, that sort of backs us into the
23 problem because the *Lee* case tells us that if the Government
24 doesn't have the application, it doesn't have to turn it over
25 to the -- to the defense.

1 So -- so it leads to, I believe, an anomalous
2 result because if -- if you accept my argument that this is
3 really no different than a Title III situation, you got
4 somebody in the United States getting their telephone calls
5 intercepted. Ordinarily, no one would argue, well, you need
6 a court order to do that.

7 And then if you're charged based on that, you've
8 got the right to see the application and, you know, argue
9 minimization and probable cause and all the rest of it.

10 But it's sort of circular here to say well, yeah,
11 maybe all that happened, but because it's a Canadian warrant,
12 we don't have to show you the application for it. And since
13 we don't have to show it to you, you can't challenge it.

14 So there's where the anomaly comes in about it.
15 We're sort of backed into a corner here because we're being
16 treated differently than if the same thing had happened, but
17 the -- the intercept order issued from this Court, for
18 example, and then we could challenge it.

19 **MAGISTRATE JUDGE MCCARTHY:** But in this case, as in
20 *Lee*, I think, the Government does not have the Canadian
21 documents. It's one thing if they have them and say we're not
22 going to turn them over.

23 They don't have them and as the Court noted in *Lee*,
24 you could apply through letters rogatory to get these
25 documents from the Canadian court.

1 So it's not like you're totally stonewalled in the
2 ability to challenge it if it comes to that.

3 **MR. BROWN:** Judge, on that point, Your Honor --

4 **MAGISTRATE JUDGE MCCARTHY:** Can you just get a
5 little closer to the mic, please?

6 **MR. BROWN:** Yeah, I'm sorry, Judge.

7 Judge, I just learned last week that there is a --
8 I believe it's in the nature of a civil proceeding that's been
9 brought in Ontario on behalf of Mr. Johnson and Ms. Samuels,
10 and I've seen orders directing the turnover of the application
11 up there.

12 Now, I don't know how that works. I just learned
13 of it last week, so it's not in our papers. But there is an
14 order directing the turnover to -- to counsel up there
15 representing Ms. Samuels and Mr. Johnson.

16 I don't know -- I don't know how it plays out
17 because even if we -- even if ultimately we get them, then I
18 don't know if we're back in to Lee again where I don't know if
19 this Court is going to -- I mean, how would you examine them?

20 I mean, if this -- would it be a situation of
21 saying, well, are they legal under U.S. procedures?

22 **MAGISTRATE JUDGE MCCARTHY:** Well, I think the test
23 is if it's -- if it's -- you'd have to show in some way that
24 it was so irregular that it shocks the conscience of the
25 Court, right? I mean, that's --

1 **MR. BROWN:** That is an exception here that the
2 courts recognize.

3 **MAGISTRATE JUDGE MCCARTHY:** Yeah. I don't know,
4 but -- well, let me hear -- Mr. White, let me hear from you
5 for a moment and we'll see where we go.

6 **MR. WHITE:** Thanks, Judge.

7 I think just to clarify things a little bit, I want
8 to start out by saying I think the whole -- Mr. Brown's point
9 about the physical location of the communications is a
10 complete red herring here based on the analysis that's -- that
11 other courts have established, including *Getto*.

12 And that's because the focus is on whether there's
13 improper conduct of the law enforcement officers involved in
14 gathering the wiretap information.

15 And here, as has been well-settled and as the Court
16 itself acknowledged in the prior decision it had in the
17 *Davidson* case and then also in this co-defendant's case, the
18 *Samuels* case, it's -- it's improper for a U.S. court to -- or
19 exclusionary rule that governs wiretap information here, does
20 not apply to evidence seized by foreign police agents because
21 actions of American courts are unlikely to influence the
22 conduct of foreign agents.

23 That's the premise. And Title III does not apply
24 to the conduct of foreign officials and foreign courts. And
25 so what the analysis really focuses on -- the exceptions to

1 those rules are, as the Court acknowledged, whether the
2 conduct of foreign officials is so egregious that it somehow
3 would shock the conscience of an American court.

4 And we don't -- I don't believe Mr. Brown is
5 asserting that here. I mean, I think the Court is right in
6 that if he's able to get access to the Canadian application
7 and the affidavits there and there's something so nefarious in
8 there, then he can make that argument here.

9 But that -- but we don't have that here, at least
10 at this point in time. And then the other exceptions, Judge,
11 are when the conduct of foreign officials render them agents
12 of U.S. law enforcement where -- and where the idea is that an
13 American court could intervene and suppress foreign wiretap
14 information, if it was just a ruse essentially and it was set
15 out sort of a joint venture where American agents and foreign
16 agents got together and said let's try to circumvent the
17 U.S. Constitution to get wiretap information and they somehow
18 envelope and get a foreign court to help them do that.

19 And here, again, there's nothing indicated here
20 that -- and I can test the allegation this is a joint
21 investigation. This clearly was solely a Canadian
22 investigation.

23 The wiretap information and the application and the
24 Canadian warrant was obtained by the RCMP on January 30th,
25 2014, almost two months before American agents got involved on

1 March 20th, 2014.

2 And they only became involved because the Canadians
3 asked them to, because they gathered that intelligence based
4 in part on the wiretap information that they got that
5 Mr. Johnson potentially was going to cross over the border and
6 pick up the meth and then try to take it back.

7 That's when the Americans got involved. And
8 that's -- that -- the -- I think the exception where this
9 Court would be warranted in suppressing the evidence is based
10 on a set of facts where somehow American agents were involved
11 at the beginning and, again, colluded with foreign officials,
12 foreign agents to get wiretap authorization by a foreign
13 court.

14 And that's just not what happened here. It's
15 completely done independently by the Canadians. They applied
16 for it, they got it by a Canadian court. It had nothing to do
17 with -- at that point it had nothing to do with American
18 agents at all.

19 It was only after they realized that Mr. Johnson
20 and Ms. Samuels potentially were going to cross into the
21 border that they requested U.S. authorities' help.

22 The other exception -- again, it's very similar, I
23 guess, in my mind, where the exceptions where cooperation
24 between U.S. and foreign officials was designed to evade
25 constitutional requirements applicable to American officials.

1 Again, that's not -- that is not the situation
2 here. There was no collusion at the outset between American
3 officials or agents and the Canadian officials.

4 Again, it was an independent investigation by the
5 Canadians. They, I believe rightfully, obtained -- lawfully
6 obtained a Canadian wiretap authorization from a Canadian
7 court.

8 So -- and Mr. Brown is trying to say that the one
9 distinguishing characteristic of this case versus like *Getto*
10 and the other cases that came before it, that somehow it's
11 different because there were some communications of this
12 defendant, Mr. Johnson, that touched -- touched on the United
13 States and that again is -- I believe it's immaterial, Judge.
14 It doesn't matter.

15 And I think it's important to note as well, Judge,
16 that Mr. Johnson's cell phone was not a target telephone of
17 the Canadian wiretap. It was only -- it was Stacy Samuels and
18 Andre Samuels and I think there were a few more. But his
19 phone was not the target telephone.

20 But admittedly I think some of his communications
21 were intercepted where he just -- based on the calls that he
22 made and text messages he sent to Mr. Samuels' phone.

23 And so even though maybe again like the fact that
24 maybe -- maybe when he was in Niagara Falls, New York that a
25 U.S. cell tower was, you know, somehow pinged and involved in

1 that is immaterial to the legitimacy of the Canadian
2 investigation and -- and their -- the wiretap warrant that was
3 issued there.

4 It doesn't -- just the mere fact that some of these
5 communications touched on American soil doesn't give this
6 court jurisdiction to go in and say, well, there's something
7 improper here. I'm going to -- that this court would then
8 have justification for suppressing the evidence here.

9 And there's nothing in the record that suggests --
10 and that's what the cases focus on -- is that is there some
11 sort of improper conduct between -- involving American agents
12 and foreign agents.

13 And there's nothing here that suggests that. And,
14 again, I think -- I know that Mr. Brown refers to the
15 expectation of privacy that Mr. Johnson would have in his
16 phone calls, and that's correct. That doesn't -- the fact
17 that he again -- that he traveled and he was -- traveled into
18 the United States, he still has an expectation of privacy
19 there, but the Canadian -- the Canadian wiretap warrant
20 authorized interception of communications from Ms. Samuels'
21 phone as well as from Mr. Samuels' phone and that was a
22 legitimate authorization there.

23 And the fact that Mr. Johnson's phone calls to Mr.
24 Samuels and his text messages got intercepted, that was
25 warranted. The Canadian court felt that that was justifiable.

1 **MAGISTRATE JUDGE MCCARTHY:** All right, counsel, I
2 think I have your positions. I'll take another look at --

3 **MR. BROWN:** Judge, could I just make a very brief
4 reply?

5 **MAGISTRATE JUDGE MCCARTHY:** Yeah.

6 **MR. BROWN:** I apologize for interrupting.

7 **MAGISTRATE JUDGE MCCARTHY:** That's all right.

8 **MR. BROWN:** Judge, just one other point here is
9 that this is not a case, Your Honor, where we have this
10 Canadian wiretap order. Mr. Johnson comes over to the United
11 States, the Canadians intercept his calls, then they wait for
12 him at the bridge and arrest him when he goes back to Canada.
13 That didn't happen here.

14 This is a case where he's never been extradited to
15 Canada. As far as we know, there's no Canadian prosecution at
16 all.

17 So this isn't like a situation where -- where it's
18 anything less than a joint investigation because it turns out
19 everything's done over here in the United States: He's
20 charged in the United States; he's surveilled in the United
21 States; his telephone calls are intercepted in the United
22 States.

23 And to say that he can't do anything about the
24 interception because it's a Canadian wiretap order, there's a
25 different set of facts here, Judge.

1 **MAGISTRATE JUDGE MCCARTHY:** All right, I'll take
2 another look at it and I'll get a Report and Recommendation
3 out focusing on this issue and I believe you confirm,
4 Mr. Brown, that this is the remaining issue in --

5 **MR. BROWN:** Yes, this is the pivotal issue, Judge.

6 **MAGISTRATE JUDGE MCCARTHY:** Okay, thank you all.

7 **MR. WHITE:** Thank you, Judge.

8 **MR. BROWN:** Thank you.

9 **MR. WHITE:** Judge, I'm sorry. I just thought I
10 would note the 30 day under advisement period begins --

11 **MAGISTRATE JUDGE MCCARTHY:** Yes, time remains
12 excluded for another 30 days, correct?

13 **MR. BROWN:** Yes, Judge.

14 **MR. WHITE:** Correct.

15 **MAGISTRATE JUDGE MCCARTHY:** Thank you.

16 Defendant's remanded.

17 (WHEREUPON, the proceedings adjourned at 11:23 a.m.)

18 * * *

19

20

21

22

23

24

25

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Christi A. Macri, FAPR-CRR
Official Court Reporter